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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 715

ROBERT W. HICKS, *Petitioner*

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the UNITED STATES, and PHILIP YOUNG, GEORGE M. MOORE and FREDERICK J. LAWTON, United States Civil Service Commission, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

ROBERT W. HICKS, *Petitioner*

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the UNITED STATES, and PHILIP YOUNG, GEORGE M. MOORE and FREDERICK J. LAWTON, United States Civil Service Commission, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Robert W. Hicks, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on November 13, 1958.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals is not yet reported, but it is printed in the appendix to this petition (App., *infra*, pp. 1a-2a).

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 (App., *infra*, p. 3a). A timely petition for rehearing *in banc* was denied on December 17, 1958 (App., *infra*, p. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I.

Whether the Civil Service Commission are indispensable parties defendant to an action brought by a member of the classified civil service for restoration to his federal employment where he was removed therefrom by the head of his employing agency at the direction of the Civil Service Commission, but in violation of the provisions of the Lloyd-LaFollette Act.

II.

Whether the Civil Service Commission by the mere device of directing the employing agency to remove a member of the classified civil service from his federal employment can thereby insinuate themselves as indispensable parties defendant to an action brought by such employee against the head of his employing agency for restoration of his employment on the ground

that his removal therefrom was contrary to the provisions of the Lloyd-LaFollette Act.

III.

Whether the head of a federal agency has the right and the power with or without the approval of the Civil Service Commission to restore to office a member of the classified Civil Service who has been removed from his employment by such agency head at the direction of the Civil Service Commission, but contrary to the Lloyd-LaFollette Act.

STATUTES AND REGULATIONS INVOLVED

Rev. Stat., section 388, 5 U.S.C. 361, providing as follows:

> "Establishment. There shall be at the seat of government an executive department to be known as the Post Office Department, and a Postmaster General, who shall be the head thereof, and who shall be appointed by the President, by and with the advice and consent of the Senate, and who may be removed in the same manner; and the term of the Postmaster General shall be for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed."

Rev. Stat., section 396, 5 U.S.C. 369, providing in pertinent part as follows:

> "Duties of Postmaster General. It shall be the duty of the Postmaster General:
>
> * * * * *
>
> "Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service."

Lloyd-LaFollette Act, 37 Stat. 555 (1912), as amended, 62 Stat. 354 (1948), 5 U.S.C. 652 (a), providing in pertinent part:

> "(a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person effected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects."

Section 9.101 of the Civil Service Rules and Regulations, providing in pertinent part:

> "Agency responsibility for separation or demotion of employees.
>
> (a) The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity

is such that his removal, demotion, or reassignment will promote the efficiency of the service . . ."

Veterans Preference Act, 58 Stat. 390 (1944), as amended, 5 U.S.C. section 863 (1952), providing in pertinent part:

". . . after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends. . . ."

STATEMENT OF THE CASE

This action was filed by the petitioner on October 5, 1956 in the District Court seeking declaratory and injunctive relief to secure the restoration of his employment with the United States Post Office Department (R. 1). Jurisdiction of the District Court was invoked under Title 28, Sections 2201 and 2202 of the United States Code, and Title 11, Section 315 of the District of Columbia Code. Named as defendants were Arthur E. Summerfield, Postmaster General of the United States, and the then members of the United States Civil Service Commission, Philip Young, George M. Moore, and Frederick J. Lawton.

In his complaint the petitioner, who has been a Federal career employee for about twenty years, alleged that at all times material to the act and particularly on October 7, 1955, the date of his removal, he had been a member of the classified civil service of the

United States being at the time employed by the United States Post Office Department as an engineering draftsman (mechanical), Grade G. S. 818-7, earning a salary of $4,525.00 per annum.

As an exhibit to his complaint, the petitioner attached a copy of the "Notification of Personnel Action" dated October 7, 1955 by which the Post Office Department dismissed him for the following reasons:

> "For false and misleading statements in your Civil Service papers concerning separations from previous employments and experience, and other evidence of unsuitability for Government employment." (R. 5).

In setting forth the grounds for the relief he sought, petitioner alleged further in his complaint that his removal from office was improper and contrary to law in that it was in violation of the provisions of the Lloyd-LaFollette Act which he claimed were applicable to him and his employment.

Following the filing of their answer to the complaint, the respondents moved the District Court to dismiss the complaint on the ground that during the pendency of the suit the respondents George M. Moore and Philip Young had resigned from office, that the petitioner had failed to substitute as parties their successors in office, and that such successors were indispensable parties to the suit.

After the hearing on the motion, the District Court entered an Order on March 19, 1958 granting the defendant's motion and dismissing the complaint without findings or opinion (R. 13).

On appeal to the Court of Appeals it was conceded that the Civil Service Commission had directed petitioner's removal and that Court concluded that "under the circumstances of this case the Civil Service Commissioners were indispensable parties to the suit" and affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. By its decision in this case, the Court of Appeals has established the District of Columbia, which is the only jurisdiction where service of process can be made upon the members of the Civil Service Commission, as the sole forum for all Federal employees having grievances similar to those of the petitioner. And this is true without regard to whether or not the Federal employee wishing to assert a legal right is a resident of or employed in the District of Columbia. Without venturing the number of Federal employees resident throughout the 49 states, they constitute a vast assemblage for many of whom it would be vexatious, if not impossible, to conduct their litigation in the District of Columbia where the Court of Appeals has said it must be conducted. In consequence, the litigant of modest means who by chance lives beyond the District of Columbia is as a practical matter deprived of his fundamental right to seek a judicial remedy.

2. Affecting as it does all classified civil servants of the Federal Government, it seems apparent that the ruling of the Court of Appeals needs more than an expression of law predicated on "the circumstances of this case." Certainly the ruling because of its importance should be clarified and elaborated upon for the guidance of litigants in future cases. It is submitted that in citing *Blackmar* v. *Guerre*, 342 U.S. 512 (1952),

and *Benenati* v. *Young*, 95 U.S. App. D.C. 120, 220 F. 2d 383 (1955), as sufficiently analogous to lend some support to the text of its opinion, the Court of Appeals only served to develop further the uncertainty surrounding the questions involved. *Blackmar* dealt with Section 14 of the Veterans Preference Act of 1944, as amended, (5 U.S.C. 863) which expressly gives to the Civil Service Commission the absolute right to direct that the employing agency remove the employee. In view of this peculiar statutory authority it is clear that the members of the Civil Service Commission are indispensable parties to a suit brought under that Act.

In *Benenati* the decision was *per curiam* and the facts recited by the Court do not tell us the statutory basis for the discharge concerning which the employee there complained. It is noted, however, that in that case this Court cited *Blackmar* and it is accordingly assumed that the Civil Service Commission in *Benenati* acted under a statutory power making its findings mandatory upon the employing agency. In any event, the Court concluded in *Benenati* that there was statutory compliance from which the decision followed that the dismissal ordered by the District Court was correct. In that posture the question of the indispensability of the members of the Civil Service Commission was rendered nugatory.

In the case at bar, however, the petitioner made no claim that he was a preference eligible. He asserted no entitlement to relief under 5 U.S.C. 863. Rather, he relied solely on the Lloyd-LaFollette Act, 5 U.S.C. 652(a), looking for an implementation of the procedural safeguards that this latter Act contains and for

the fulfillment of which only the employing agency is responsible. As the petitioner contended in the District Court and in the Court of Appeals, since the Civil Service Commission is neither conferred with any power nor charged with any duties under the Lloyd-LaFollette Act, it is the head of the employing agency and only he who is necessary to afford the relief prayed for.

3. In holding that the Civil Service Commissioners were indispensable parties to the petitioner's suit, the Court of Appeals wrote into the Lloyd-LaFollette Act a directive to the Civil Service Commission which the Congress itself did not see fit to include. If the Congress believed a Government employee to be amply protected by requiring only that the employing agency be held to account for the procedural safeguards found in the Lloyd-LaFollette Act, then it was not for the Court of Appeals to go beyond the conclusions of the legislature. Obviously the Congress thought it enough that the employing agency alone should be held to respond to the provisions of the Act; if the Congress had thought otherwise, then it may be assumed it would have, as it did in the Veterans Preference Act of 1944, as amended, give to the Civil Service Commission the authority it claims to have.

Nor, it is submitted, did the Congress intend that by the expedient of directing the removal of a classified civil servant in violation of the Lloyd-LaFollette Act the Civil Service Commission could in such manner insinuate itself into a situation where it did not belong. It seems a compelling conclusion that even though a removal is at the direction of the Civil Service Commission it is still the employing agency which

must abide the terms of the Lloyd-LaFollette Act and failing that to restore the employee to office.

In *Williams* v. *Fanning,* 332 U.S. 490 (1947), this Court held in an injunction suit brought against a local postmaster who was enforcing a fraud order of the Postmaster General that a decree against the local postmaster would effectively grant the relief desired for the reason that if he desisted from the acts complained of the matter would be at an end without requiring the Postmaster General "to do a single thing." Likewise, in this case a decree requiring the respondent Summerfield to restore the petitioner to his employment would effectively grant the relief desired for nothing is required of the Civil Service Commission. It is the Postmaster General who is the head of the Post Office Department (5 U.S.C. 361); it is he who is responsible for superintending the business of the Department (5 U.S.C. 369); and it is he who has the power to determine the qualifications of applicants for and the competency of holders of positions in the Department (*Keim* v. *United States,* 177 U.S. 290). And this power of the employing agency is given credence in the Civil Service Regulations themselves which at Section 9.101 provide:

> "The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service. . . ."

Therefore, a decree against the Civil Service Commission in this case would by implication invest them with a power they do not have and which is reserved to the Department head.

4. Standing alone the judgment of the Court of Appeals imposes an intolerable burden upon many Government employees to litigate their grievances in a jurisdiction foreign to both their residence and their place of employment. Read with the case of *Schwartz* v. *Mathias*, 235 F. 2d 620 (3rd Cir. 1956), it creates a conflict between the circuits which only this Court can resolve. In *Schwartz* the dismissal like in this case emanated from the Post Office Department on the basis of what was apparently the direction of the Security Hearing Board and there the Third Circuit held:

> "An order directed to the Security Hearing Board would be ineffectual to effect Schwartz's reinstatement since it was the Postmaster General, and not the Hearing Board, who dismissed Schwartz and only the Postmaster General can reinstate him."

If an order directed to the Security Hearing Board in *Schwartz* would have been ineffectual, then to the same extent would an order against the Civil Service Commission be ineffectual in the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,483

ROBERT W. HICKS, *Appellant*

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and PHILIP YOUNG, *et al.*, United States Civil Service Commission, *Appellee*

Appeal from the United States District Court for the District of Columbia

Decided November 13, 1958

Mr. Richard A. Mehler, with whom *Messrs. George J. Goldsborough, Jr.*, and *Charles P. Hovis* were on the brief, for appellant.

Mr. Howard E. Shapiro, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch*, United States Attorney, and *Morton Hollander*, Attorney, Department of Justice, were on the brief, for appellee. *Mr. Carl W. Belcher*, Assistant United States Attorney, also entered an appearance for appellees.

Before FAHY, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* Appellant (plaintiff) appeals from an order of the District Court dismissing his suit against the Postmaster General and the Civil Service Commissioners. Appellant sought reinstatement to his employment with the United States Post Office Department and asked that the court issue a preliminary and permanent mandatory injunction requiring appellees (defendants) to restore appellant to his employment in the United States Post Office Department, retroactive to the date of

his dismissal. Appellant was dismissed by a Notification of Personnel Action emanating from the Post Office Department, the grounds stated therein being:

> "For false and misleading statements in your civil service papers concerning separations from previous employments and experience, and other evidence of unsuitability for Government employment."

It is conceded that the Civil Service Commission directed the removal action complained of.

While the suit was pending in the District Court, two of the defendant Civil Service Commissioners resigned from the Commission and their successors were not substituted as parties defendant within six months after taking oath of office, as required by FED.R.CIV.P. 25(d).[1] On motion, based on the failure to substitute indispensable parties, the District Court dismissed the complaint but without prejudice. Appellant contends that the complaint should not have been dismissed because the members of the Civil Service Commission were not in fact indispensable parties.

We believe that under the circumstances of this case the Civil Service Commissioners were indispensable parties to the suit and, they not being before the court, the action was properly dismissed. *Cf. Blackmar* v. *Guerre*, 342 U.S. 512 (1952); *Benenati* v. *Young*, 95 U.S.App.D.C. 120, 220 F.2d 383 (1955).

Affirmed.

---

[1] "When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. . . ."

FED.R.CIV.P. 6(b) provides that the court may not extend the time for taking action under Rule 25(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

C. A. 4031-56

No. 14,483

ROBERT W. HICKS, *Appellant*,

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and PHILIP YOUNG, et al., United States Civil Service Commission, *Appellees*.

Appeal from the United States District Court for the District of Columbia

Before: FAHY, DANAHER and BASTIAN, Circuit Judges.

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order . . . of the District Court appealed from in this cause be, and it is hereby affirmed.

PER CIRCUIT JUDGE BASTIAN

Dated: November 13, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1958

No. 14,483

Filed Dec. 17, 1958

ROBERT W. HICKS, *Appellant*,

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and PHILIP YOUNG, *et al.*, United States Civil Service Commission, *Appellee*.

Before: PRETTYMAN, *Chief Judge*, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges, in Chambers*.

Order

Upon consideration of appellant's petition for a rehearing in banc, it is

ORDERED by the court that the petition for rehearing in banc is denied.

Dated: December 17, 1958

Per Curiam.

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Office-Supreme Court, U.S.
FILED
MAR 24 1959
JAMES R. BROWNING, Clerk

No. 715

In the Supreme Court of the United States

October Term, 1958

ROBERT W. HEISS, PETITIONER,

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 715

ROBERT W. HICKS, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 1a) is reported at 261 F. 2d 752.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 (Pet. App. 3a). A timely petition for rehearing *en banc* was denied on December 17, 1958 (Pet. App. 4a). The petition for a writ of certiorari was filed on February 20, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the individual members of the Civil Service Commission are indispensable parties to a suit for reinstatement by a former employee of the Post Office Department, discharged at the direction of the Commission as unsuitable for Federal employment.

STATUTES AND REGULATIONS INVOLVED

Pertinent parts of the Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 632, 633, Executive Order 10577, 19 F.R. 7521 (following 5 U.S.C. 631 (Supp. V)), Civil Service Regulation 2.104, 5 C.F.R. 2.104 (1949), and Civil Service Regulation 2.112, as amended, 19 F.R. 1691, are set forth in the appendix, *infra*, pp. 10–13.

STATEMENT

This is a suit challenging petitioner's dismissal from the Federal Civil Service for making false statements in his Civil Service papers.

The complaint, filed by petitioner in the United States District Court for the District of Columbia, alleges that he is a member of the classified Civil Service; that he was employed in the Post Office Department as an engineering draftsman; and that, on October 7, 1955, he was informed of his removal from his employment by a "Notification of Personnel Action" (Appellant's App. 2, 5).[1] This Notification was attached to and incorporated into the complaint. It states that petitioner was being removed on the

[1] Petitioner has filed nine copies of the appendix to his brief as appellant in the court below. This appendix contains the proceedings in the district court. References to it will be designated as "Appellant's App. —."

authority of "C.S. Central Office ltr. of 9/28/55 * * * For false and misleading statements in your civil service papers concerning separations from previous employments and experience, and other evidence of unsuitability for Government employment" (Appellant's App. 5).

The defendants' answer denied that plaintiff was a member of the classified Civil Service at the time alleged, and averred that his appointment to the position from which he was removed was subject to investigation by the Civil Service Commission. The answer further stated that the procedures followed by the Civil Service Commission and the Post Office Department were legal and proper, and that the case was moot for the reason that plaintiff had retired from Government service (Appellant's App. 7–8).

On February 7, 1958, the Government filed a motion to dismiss on the ground that petitioner had not substituted two indispensable parties (Appellant's App. 8). In support of the motion, the Government pointed out that defendants George M. Moore and Philip Young had resigned from the Civil Service Commission on February 28, 1957; and that Harris Ellsworth and Christopher H. Phillips,[1] who succeeded to their offices on April 17, 1957, had not been substituted as parties defendant within the 6-months' period required by F.R.C.P. 25(d) (Appellant's App. 9–10. On March 19, 1958, the District Court entered

[1] Mr. Phillips left office on December 30, 1957; Mr. Ellsworth, on February 28, 1959.

an order dismissing petitioner's complaint without prejudice (Appellant's App. 13).

On appeal, the judgment was unanimously affirmed by the Court of Appeals, which stated:

> It is conceded that the Civil Service Commission directed the removal action complained of.
>
> * * * * *
>
> We believe that under the circumstances of this case the Civil Service Commissioners were indispensable parties to the suit and, they not being before the court, the action was properly dismissed. *Cf. Blackmar* v. *Guerre,* 342 U.S. 512 (1952); *Benenati* v. *Young,* 95 U.S. App. D.C. 120, 220 F. 2d 383 (1955). [Pet. App. 2a.]

ARGUMENT

Petitioner was removed from his position at the direction of the Civil Service Commission, which found that he had made false statements in his Civil Service papers. The Commission's direction to the Postmaster General was mandatory under Section 5.4 (d) of Executive Order 10577, 19 F.R. 7521. Since petitioner was removed under the mandate of the Commission, individual members of the Commission had to be joined as parties defendant before the legality of their action in directing the removal could be adjudicated. This was the basis of this Court's decision in *Blackmar* v. *Guerre,* 342 U.S. 512, and of the Court of Appeals' holding in *Benenati* v. *Young,* 220 F. 2d 383. We submit that both courts below were clearly correct in applying this well-established principle to the present litigation. And there is no

conflict of decisions, nor any other ground for review by this Court.

1. In the *Blackmar* case, this Court held that in any suit challenging a dismissal from Federal employment, the individual Civil Service Commissioners must be joined as parties if the Commission has acted in the matter. In that case, the Commission merely affirmed the action of the Veterans' Administration in dismissing an employee. If a bare affirmance of agency action is sufficient to make the individual members of the Civil Service Commission indispensable parties to a reinstatement suit, then it obviously follows that they are indispensable parties where, as here, the Commission itself has directed the employee's removal.

Congress and the President have made the Commission's directions with respect to the hiring and firing of civil service employees binding upon every major agency in the Executive Branch of the Government. The statutory foundation for the Commission's sweeping supervisory role is found in Section 2 of the Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 633, which directs the Civil Service Commission to "aid the President, as he may request, in preparing suitable rules" for governing the Federal Civil Service. In Executive Order 10577, 19 F.R. 7521 (following 5 U.S.C. 631 (Supp. V)), President Eisenhower established the current Civil Service Rules. In this Order, the President directed the Civil Service Commission "to promulgate and enforce such regulations as may be necessary to carry out and enforce the provisions of the Civil Service Act and Rules,

the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission". Sec. 5.1, *infra*, pp. 10–11. Whenever the Commission issues specific instructions (within its jurisdiction) as to dismissal, discipline or restoration of an employee, the appointing officers in the employing agency are under a Presidential mandate to comply with those instructions. Sec. 5.4(d), *infra*, pp. 11–12. In the event that both the appointing officer and the agency head disregard the Commission's instructions, the President's Order instructs the Commission to certify the facts to the Comptroller General, whereupon "no payment shall be made of the salary or wages accruing to the employee concerned." Sec. 5.4(e), *infra*, p. 12. Even the appointing authority of chiefs of executive agencies is delegated by the Commission (5 C.F.R. 2.101 (Supp. 1958)) and may be withdrawn by the Commission "whenever it finds that the Commission's regulations and instructions have not been followed * * *" (5 C.F.R. 2.110(b) (Supp. 1958)).

It is particularly important to note here the special and comprehensive role occupied by the Civil Service Commission in investigating and determining the qualifications and suitability of an individual for Federal Civil Service employment. The pertinent regulations explicitly provided:

> (d) Appointments are made conditional under this section to retain the [Civil Service] Commission's jurisdiction to investigate the qualifications of an applicant after appointment, and to order removal when it finds an employee is disqualified for Federal employ-

ment. [Civil Service Regulation 2.112, *infra*, p. 13.]

Under regulations in force at the time of petitioner's removal, appointments were conditional upon Civil Service investigation for a period of 18 months. For false statements in application papers, however, the Commission reserved the right to order removal even after the 18-months' period had expired. Civil Service Regulation 2.112(c), *infra*, pp. 12–13.

In the present case, the Commission found, after investigation, that petitioner had made "false and misleading statements" in his Civil Service papers, and it determined that he was unsuitable for Government employment (Appellant's App. 5). Accordingly, it ordered the Post Office to remove him.

In light of the foregoing, it cannot be doubted that the Post Office was legally bound to accept the Commission's direction to remove petitioner. As *Blackmar* shows, the Postal authorities cannot reinstate him unless and until the Commission reverses its order of removal. Petitioner apparently recognized this at the time he filed his complaint, for he named the Civil Service Commissioners as parties, and prayed that they, as well as the Postmaster General, be compelled to reinstate him. Since the Commissioners are indispensable parties to the action, petitioner's failure to substitute their successors necessarily abated the action. F.R.C.P. 25(d); *Snyder* v. *Buck*, 340 U.S. 15.*

* Since the controlling issue in this case is whether the Commissioners are indispensable parties, we do not undertake to demonstrate that the procedures guaranteed petitioner by

2. The decisions relied on by petitioner have no application. Since the Commissioners' order directing petitioner's removal would have to be reversed by them before petitioner could be reinstated, it is obvious that the considerations underlying this Court's decision in *Williams* v. *Fanning*, 332 U.S. 490, are inapposite here.[4] Equally without merit is petitioner's contention that the decision below conflicts with *Schwartz* v. *Mathias*, 235 F. 2d 620. There, the Third Circuit simply held that the Postmaster General was an indispensable party to an employee's suit challenging his dismissal, on security grounds, under P.L. 733, 81st Cong., 5 U.S.C. 22–1. There was, of course, no occasion for the Third Circuit to decide whether the Civil Service Commissioners should also have been treated as indispensable parties.

3. Petitioner urges that the decision below forces Federal employees, wherever resident, to litigate their dismissals exclusively in the District of Columbia. But certainly this is no cause for complaint by peti-

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statute were followed. Even if there were color to petitioner's claim that he had been denied his rights under the Lloyd-LaFollette Act, 37 Stat. 555, as amended, 5 U.S.C. 652, by the Commission's direction ordering his removal, it is plain that this issue could not be adjudicated unless the Commissioners were before the court. The Postmaster General cannot reinstate petitioner independently of the Commission's determination without violating Section 5.4(d) of Executive Order 10577. Relief against the Postmaster General alone would thus create a conflict between the Commission's unreversed order of dismissal and the District Court's judgment of reinstatement.

[4] That case turned on the proposition that the superior is not indispensable where there is no obstacle to granting all of the relief sought by a decree directed to the subordinate.

tioner, who is not only a resident of the District of Columbia but was employed there (Appellant's App. 1, 5). Moreover, the same result would follow from petitioner's contention that the Postmaster General is the sole indispensable party. Indeed, the basis of the Third Circuit's decision in *Schwartz* was that the Postmaster General can only be sued at the seat of Government. Under *Blackmar* v. *Guerre, supra,* there is no other place in which an employee like petitioner can sue for reinstatement. Finally, it should be noted that centralizing this kind of litigation has resulted in the creation, by the courts of the District of Columbia, of a uniform system of Civil Service law based upon their interpretations of the relevant statutes and regulations. Congress has not seen fit to abandon this system, and this case presents no occasion for this Court to entertain petitioner's arguments against it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1959.

APPENDIX

The Civil Service Act of 1883, 22 Stat. 403, as amended, 5 U.S.C. 632, 633, provides in pertinent part as follows:

> SEC. 632. Civil Service Commission; appointment; removal, and compensation of commissioners.
>
> The President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as civil service commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.
>
> * * * * * *
>
> SEC. 633. Rules.
>
> It shall be the duty of said commissioners:
>
> (1) Preparation of.
>
> First. To aid the President, as he may request, in preparing suitable rules for carrying this section and sections 632, 635, 637, 638, and 640–642 of this title, into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect.
>
> * * * * *

Executive Order 10577, 19 F.R. 7521 (following 5 U.S.C. 631 (Supp. V)) provides in pertinent part as follows:

> SEC 5.1 *Regulations.* (a) The Commission is authorized and directed to promulgate and

enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules, the Veterans' Preference Act, and all other applicable statutes or executive orders imposing responsibilities on the Commission.

* * * * *

SEC. 5.4 *Enforcement authority of the Commission.* (a) Whenever the Commission finds that any person has been appointed to or is holding a position in violation of the Civil Service Act, Rules or Regulations, or that any officer or employee in the executive branch has violated this order or any of the laws, rules or regulations administered by the Commission, it is authorized, after giving due notice and opportunity for explanation to the officer or employee and the agency concerned, to certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal or other corrective action.

(b) Whenever the Commission finds that any officer or employee in the executive branch has failed to adhere to established policies, regulations, and standards relating to personnel management subject to the jurisdiction of the Commission, it shall instruct the agency head to take corrective action.

(c) Whenever, on the basis of an appeal by an employee, the Commission finds that its regulations prescribing procedures to be followed by agencies in connection with adverse actions for disciplinary reasons have not been followed, or that adverse action has been taken for political reasons except as may be required by law, or resulted from discrimination because of marital status, it shall instruct the agency to restore the employee to duty.

(d) Whenever the Commission issues specific instructions as to discipline or dismissal of an officer or employee, or to restore an officer or employee to duty, the appointing officer

concerned shall comply with the Commission's instructions.

(e) If the appointing officer fails to carry out the instructions of the Commission issued under section 4(a) of this Rule, the Commission shall certify the facts to the head of the agency concerned. If the head of the agency fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the Comptroller General of the United States, and shall furnish a copy of such certification to the head of the agency concerned; and thereafter no payment shall be made of the salary or wages accruing to the employee concerned.

Civil Service Regulation 2.112, as amended, 19 F.R. 1691, provides in pertinent part as follows:

SEC. 2.112 *Appointments subject to investigation.* (a) The following types of appointment are "subject to investigation" by the Commission to establish the individual's qualifications and suitability for employment in the competitive service:

(1) Probational.
(2) Reinstatements.
(3) Temporary.
(4) Indefinite appointments under Parts 2, 7, and 8 of this chapter.
(5) All conversion actions.
(6) Transfers.
(7) Reemployments.

* * * * *

(c) For a period of 18 months from the effective date of one of the types of appointment in paragraph (a) of this section, the Commission may order removal if investigation discloses that the employee is disqualified for any of the reasons listed in section 2.104. After 18 months from the effective date of such appointment the Commission may order removal

only on the basis of the disqualifications listed in section 2.104(a)(4).

(d) Appointments are made conditional under this section to retain the Commission's jurisdiction to investigate the qualifications of an applicant after appointment, and to order removal when it finds an employee is disqualified for Federal employment.

* * * * *

Section 2.104 referred to in Section 2.112 quoted above, provides (5 C.F.R. 2.104 (1949)):

SEC. 2.104 *Disqualifications of applicants.* (a) An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:

(1) Dismissal from employment for delinquency or misconduct.

(2) Physical or mental unfitness for the position for which applied.

(3) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.

(4) Intentional false statements or deception or fraud in examination or appointment.

(5) Refusal to furnish testimony as required by section 5.3 of this chapter.

(6) Habitual use of intoxicating beverages to excess.

(7) On all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

(8) Any legal or other disqualification which makes the applicant unfit for the serv[illegible]

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